IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

DEFENDANT'S MOTION TO STRIKE "NOTICE OF SPECIAL FINDINGS" FROM SUPERSEDING INDICTMENT

Standby counsel for Zacarias Moussaoui move the Court to strike the "Notice of Special Findings" from the Second Superseding Indictment filed by the government.[1]

In its Second Superseding Indictment, the government has included a "Notice of Special Findings," a heretofore unknown aspect of grand jury jurisprudence. The Notice incorporates the allegations from Counts One through Four of the Indictment, the four capital counts, and then includes the two statutory "mens rea" threshold factors and the three statutory aggravating factors which had been included in its Notice of Intention to Seek a Penalty of Death." Such a procedure, of course, appears nowhere in the Federal Death Penalty Act, nor does it have any historical precedent of which defense counsel are aware. If, indeed, the inclusion of aggravating factors in a Notice of Special Findings section of an indictment is improper, they should be stricken as surplusage. *See, e.g.,United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979) ("The purpose of Rule 7(d) is to protect a defendant against prejudicial allegations that are neither relevant nor material to the charges made in an indictment").

Initially, standby counsel adopt the arguments contained in their Supplemental

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[1] Pursuant to the Court's August 22, 2002 order, a copy of this motion was provided to Mr. Moussaoui for his review before the motion was filed.

Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death, and their Reply Supplemental Memorandum. In addition, counsel note that, in a very thorough opinion finding the FDPA unconstitutional, Judge Sessions of the District of Vermont has concluded that: (1) the mental state threshold factors and the statutory aggravating factors were intended by Congress to be sentencing factors, not elements;[2] (2) under the *Ring*[3] trilogy those factors actually function as offense elements; (3) in regard to the role of aggravating factors and the conduct of the penalty phase, the statute is unambiguous and, therefore, not subject to the doctrine of constitutional avoidance; (4) the evidentiary provisions of the FDPA, as applied to aggravating factors, are inconsistent with the Confrontation and Due Process Clauses of the United States Constitution; and (5) only Congress, not the courts, can change those provisions in the FDPA[4]. *United States v. Fell*, ___ F. Supp.2d ___, 2002 WL 31113946 (D. Vt. Sept. 24, 2002).

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[2] Judge Sessions reached this conclusion even without referencing the fact that the FDPA is included in a chapter of the Code (Chapter 227 of Title 18) entitled "Sentences" which only includes laws related to that topic, not to the underlying crimes.

[3] *Ring v. Arizona*, 122 S.Ct. 2428 (2002).

[4] The Court has not ruled on the pending motion asserting the unconstitutionality of the FDPA. Standby counsel would urge the Court to adopt the reasoning of the court in *Fell*. Since the logic of that decision so closely parallels the arguments counsel have previously advanced in this case, they do not belabor the decision in *Fell* here. Counsel note, however, that Judge Sessions properly treated the "equivalent to elements" language in *Ring* the way it plainly was intended, distinguishing offense elements which have been denoted as such by the legislature from factors that have been denoted as "sentencing factors" by the legislature but which, under the logic of the *Ring* trilogy, function as elements in that they set forth facts which raise the maximum punishment otherwise applicable to the defendant's conduct. *See Apprendi v. New Jersey*, 530 U.S. 473, 476 (2000) (*citing Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

First, it is unclear just what is intended by the Notice of Special Findings. Obviously, if the government intended it to serve as another count, alleging a "greater [death eligible] offense"[5] it would have labeled it as such. Such a new count would presumably have complied with the Indictment Clause implications of *Ring v. Arizona*, 122 S. Ct. 2428, 2441 (2002), *assuming* that the FDPA's constitutionality can be saved under *Ring*. However, if, as appears to be the case, it is not intended as another count alleging a greater offense, it is unclear why a notice such as this in an indictment would be necessary. After all, the Supreme Court made clear in *Harris v. United States*, 122 S.Ct. 2406, 2414 (2002), that, in contrast to statutes falling within the rule of *Apprendi*, "facts taken into consideration *need not be alleged in the indictment* . . . ." (emphasis added) where only *sentencing elements* are involved. In short, if aggravating factors are elements, the government should have included them in a count charging a death eligible offense, and if they are sentencing factors, it would have had no need to return to the grand jury at all, inventing in the process a new, unauthorized vehicle for providing notice of death eligibility in contravention of the FDPA. Indeed, the grand jury has no authority to investigate matters beyond the question of whether there is "probable cause to believe that a crime has been committed ....," *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) and "whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-33 (1974).

Standby counsel acknowledge that, even though the *Fell* court struck down the

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[5] *See discussion*, "Defendant's Supplemental Memorandum in Support of Motion to Dismiss Government's Notice of Intent to Seek a Sentence of Death" at pp. 3-4.

FDPA as unconstitutional for the very reasons advanced in this case, it rejected the argument that the inclusion of the Notice of Special Findings in the indictment was improper. *Op. and Order* at 26-29. In so doing, the court applied the principle that "'every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Id*. at 28 (*quoting Hooper v. California*, 155 U.S. 648, 657 (1895) and *citing Salinas v. United States*, 522 U.S. 52, 59-60 (1997)). Application of that principle in this context is erroneous, however. That principle is applicable only where the meaning of a statute is unclear. It does not apply where it is clear on its face. *See discussion*, "Defendant's Supplemental Memorandum in Support of Motion to Dismiss Government's Notice of Intent to Seek a Sentence of Death" at p. 9. Here, the statute unambiguously establishes a specific procedure that does not include grand jury involvement, a procedure which is entirely consistent with Congress' treatment of aggravating factors as sentencing factors, rather than as offense elements. The Court is, thus, not faced with an ambiguous statute to which the doctrine of constitutional avoidance is applicable. Moreover, in approving a procedure not contemplated by Congress, the *Fell* court did not address the Supreme Court cases cited above, *Branzburg* and *Calandra*, establishing that the grand jury has no authority to investigate matters beyond the existence of probable cause.

Because the Second Superseding Indictment includes a Notice of Special Findings which contains matters not germane to the establishment of any offense created by Congress, that Notice should be stricken as surplusage.

CONCLUSION

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel, on behalf of pro se Defendant Zacarias Moussaoui, move this Court to strike as surplusage the Notice of Special Findings in the Second Superseding Indictment.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Standby Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Strike "Notice of Special Findings" From Superseding Indictment was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 30th day of September 2002.

/S/
Gerald T. Zerkin